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No. 23295

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

See Vol. 3461

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| IS G. PEROVICH, dba<br>. PEROVICH CONSTRUCTION<br>LAT, | ) |
| Appellant, | ) |
| v. | ) |
| LINDGS, INC., et al., | ) |
| Appellees. | ) |

APPELLANT'S REPLY BRIEF


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UNITED STATES COURT OF APPEALS

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I

APPELLEE'S ACCOUNT OF EVENTS LEADING UP TO THE DISTRICT COURT'S ORDER OF DISMISSAL CANNOT OBSCURE CERTAIN BASIC FACTS WHICH COMPEL THE CONCLUSION THAT DISMISSAL OF THE ACTION BELOW CONSTITUTED AN ABUSE OF DISCRETION.

Appellee's account of the events leading up to the entry the order of dismissal cannot obscure certain facts which, hough set forth in Appellant's Opening Brief, are so crucial the proper determination of the instant appeal that they bear teration.

First, nothing which occurred prior to Appellant's dis- rge of his counsel in December of 1966 -- just a few months or to entry of the order of dismissal -- could even remotely

tify dismissal of the action for lack of diligent prosecution or lure to comply with court orders. United's insinuation to the trary notwithstanding, it is clear that at all times Perovich e the burden of prosecution with full fidelity to his obligations to the Court and opposing counsel.[1/]

Second, the District Court itself acknowledged that the act of Perovich which arguably did delay the prosecution of action, his discharge of a sole-practitioner attorney who had austed himself in the course of trying to get the action below related actions to trial, was not done for disruption or delay. Court found that it was the result of "a sudden hasty decision ed upon irritation, not upon reason"; and it did not warrant missal. [R.T. 1/17/67, page 73, line 1 to page 174, line 6].

Third, Appellant's failure to file a trial brief within time set by the District Court was not the result of indifference obstructionism. On the contrary, at all times after new counsel ered the case in January of 1967, Appellant prosecuted the action orously and in the manner which Appellant believed was most

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Appellee seeks to impart the impression that the District Court dissatisfied with the way in which Perovich's former counsel, Joseph Hall, Esq., conducted the case [Appellee's Brief, es 9-10; Exhibit B]. While the Court may have criticised Hall on a few particulars, its overall impression of Mr. Hall evidenced by the manner in which it complimented him as "a d working man" [R.T. 12/13/66, p. 58, line 15] and "felt he ll] was pacing himself too hard and I told him not to kill self." [R.T. 3/18/67, p. 17, lines 1-3; see Appellant's ning Brief, page 10, footnote 5].

kely to produce a final disposition of his claim on its rits, not upon the basis of some defect in the presentation that claim.

Both Appellee and the District Court in its morandum of Dismissal lay great stress upon Appellant's omise to have the trial brief filed by a given date [C.T. ge 3967, lines 1-32; Appellee's Brief, pages 14-16].

Appellant does not mean to minimize the significance promises which a litigant makes to a court in the course litigation. They create serious responsibilities and a urt acts properly in treating their breach as a grave matter deed. But, nevertheless, when a litigant does fail to abide a promise, the court, in determining whether or not it is propriate to penalize him for doing so, must consider the rcumstances out of which the failure arose and the consequences the failure both upon the court and other litigants.

When Perovich's attorney, Les J. Weinstein, Esq., cepted April 4 as the deadline for filing the trial brief, ere is no reason to believe that he did so with anything her than complete good faith. If the facts were otherwise, uld Mr. Weinstein, an experienced antitrust lawyer, have been ingenuous as to characterize the Court's action in giving m until this date as "more than generous"?[2/]

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[2/] Appellee contends that "at least two of the motions [which

Once Mr. Weinstein got deeply into the case, however, ebecame convinced that unless Perovich was granted certain relief, ability to prepare an adequate trial brief would be materially aired. At this point, Appellant, if he may be permitted

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(cont'd.)

ellant subsequently made] had been contemplated by new counsel n before he undertook the Perovich representation" [Appellee's ef, page 20]. The contention is based upon an alleged conver- ion between Mr. Weinstein and United's counsel, described in an erified memorandum, in which Mr. Weinstein supposedly "stated t if he undertook to represent the Perovich plaintiffs, he would k to undo certain prior rulings, specifically mentioning the tective order regarding defendants' documents and the order re- ing to the relevancy of evidence of concrete pipe agreements" T. 3760, lines 8-12].

Appellant will leave the propriety of attorneys using casual tements of opposing counsel in the manner in which Mr. Wein- in's alleged statement was used by United's counsel to the rt's judgment.

Be that as it may, and regardless of what statements Mr. Wein- in did or not not make to United's counsel, undoubtedly Mr. nstein was giving thought to a variety of courses of action uld he become counsel for the plaintiffs, including the motions question. It does not follow from this, however, that Mr. nstein was committed to those motions on January 18, when he epted the April 4 deadline for the trial brief. He had just e through a hearing which was clearly sufficient to bring ut a change in any tentative plans which he might have had arding the prosecution of the action. Until Mr. Weinstein ually got deeply into the case he could not have known how ential the relief which he allegedly mentioned to United's nsel was to his case, and as of the date on which he accepted April 4 deadline he did not even have a complete set of files his possession. [See Appellant's Opening Brief, pages 45-46].

e to a metaphor, found himself at a "fork in the road." One
nsisted of foregoing the necessary relief, taking a gamble
case in which approximately four years of court and attorneys'
d a very large sum of money had been invested, and preparing
t possible brief under the circumstances. Naturally, such a
might lead to ultimate failure, not because Appellant's case lacked
but because he was deprived of the opportunity to prove the merit
t had. (Again, as Appellant pointed out in his Opening Brief,
d be difficult to exaggerate the importance of the trial brief
ultimate disposition of the action below and the related actions.
a detailed blueprint for the conduct of the trial amounting to the
ation of the Plaintiffs' cases on paper, and its completion would,
ct, mean that the Plaintiffs were ready for trial.) [C.T. 3203,
to 3204, line 14; Appellant's Opening Brief, pp. 8-9].

The other path consisted of not gambling with a case in
o much time and money had already been invested, not preparing a
y inadequate trial brief, but of attempting to serve the ultimate
ve of the judicial process, a disposition on the merits, and
the motions required to obtain the necessary relief.

It may be that Appellant was not entitled to the relief sought
motions. It may be, as Appellee urges, that Perovich's right
d the complaint to allege an attempt to monopolize was waived
failure of their exhausted attorney to file the proposed amend-
few months earlier [Appellee's Brief, pages 18-19, 60-61].

It may be that the District Court acted properly in denying
nt's motion for modification of the protective order which
ed Perovich and the president of a corporate plaintiff

a related case, Charles Davin, from seeing some 90,000 documents
ch the Defendants had produced during the course of discovery,
n though there was overwhelming evidence that the documents were
ntelligible to Appellant's counsel and the only two persons who
a practical matter were available to assist Appellant's counsel in
erpreting the documents were Perovich and Davin; and even though
justification for the protective order, the protection of trade
rets, did not seem to require the Defendants to obtain a protective
er against each other [See Appellant's Opening Brief, pages 51-53].

It may be that the District Court was right in denying
ellant's motion for clarification and/or reconsideration of
orders on certain discovery matters, even though it had granted
cisely the relief which Appellant sought in other "western
e cases" and even though the ruling would appear to be erroneous
er the decision of the United States Supreme Court in Continental
Co. v. Union Carbide, 370 U.S. 690, 698-700 (1962) [See Appellant's
ning Brief, page 54].

But so what? Can it be said that Appellant acted beyond
pale of reason in seeking such relief; that there was no reason-
e possibility that he was entitled to the relief? Even the Dis-
ct Court which ultimately denied the motions, acknowledged that
re was a possibility that they would be granted [R.T. 3/18/67,
e 79, line 18 to page 80, line 21]; and an examination of the
ing papers, the papers in opposition, and the proceedings before
District Court revealed that they were a matter of serious con-
eration and that Appellant's right to the relief sought was, at

least, arguable [C.T. page 3634-3841; R.T. 4/6/67, morning, pages 7; afternoon, pages 1-60].

Had the motions been granted, it was clear from the trict Court's own statements that Appellant would have to given additional time [R.T. 3/18/67, page 77, lines 17-21] prepare the trial brief. Thus Appellant's right to continue h the case was, in effect, made contingent upon the outcome ancillary motions.

Fourth, Appellant's election to make the motions in question consequent failure to comply with the District Court's deadline not result in a disruption in the District Court's calendar materially prejudice the defendants. Had the District Court n forced to postpone a scheduled trial because of the unavail- lity of the trial brief, perhaps the situation would have n different. But here no date for the trial of the action been set and in fact the District Court had plainly indicated t the case might not be tried until the following year [R.T. 7/67, page 175, line 16 to page 176, line 2]. Similarly, it difficult to conceive of any substantial prejudice to United ulting from the brief not being filed. Undoubtedly, the memory attorneys and witnesses with respect to relevant facts dims time goes on [see Appellee's Brief, pages 22-23]; but, after , it seems unlekely that memories refreshed in October and ember of 1966 in connection with alleged "substantial preparation" depositions would be a great deal dimmer in June of 1967 n they were in April of 1967. In any event, some delays inevitable in litigation; unless they are unreasonable,

ny are simply something with which the parties must live.

Fifth and finally, once the motions were denied, Appellant i not ask for an extension until some remote future date to file the ral brief. It offered to have the required trial brief filed by ay 15, 1967, a date only approximately three weeks after the date on which the trial court entered its order of dismissal. [C.T. e 3935, line 19 to page 3936, line 9]. It is true, as Appellee serts, that "subsequent diligence is no excuse for past negligence" Appellee's Brief, page 55]. But where was the negligence here?

Appellee's suggestion that this offer was a "ploy", an insincere effort to make Appellant's position "look better" on peal [Appellee's Brief, page 38], is, Appellant submits, pre- mptuous and totally unwarranted. If Appellee really believed that was only a "ploy", why didn't it call the bluff by withdrawing motion to dismiss? Certainly United would have been in no rse position by waiting another month or two for entry of an der of dismissal, and its contention that dismissal was warranted uld have been greatly enhanced. The reason it did not do so obvious -- United was afraid that Appellant would indeed file rial brief.

II

NO AUTHORITY CITED BY APPELLEE ALTERS APPELLANT'S CONCLUSION THAT THE DISMISSAL OF THE ACTION BELOW CONSTITUTED AN ABUSE OF DISCRETION.

Appellee begins his argument with the statement that "A

ral Court's Dismissal For Failure To Comply With Orders of the
ort or for Failure to Prosecute Will Be Reversed Only If The
ort Has Abused Its Discretion" [Appellee's Brief, page 39].

This is, of course, a correct statement of the law.
ellant would point out, however, that it is such an abuse of
cretion to dismiss in any but extreme cases. As stated in
ham v. Florida East Coast Railway Co., 385 F.2d 366 (5th Cir.
7):

> "But '[t]he sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.' Durgin v. Graham, 1967, 5th Cir., 372 F2d 130, 131. The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. [citations]" (385 F.2d 368).

Appellee then proceeds to boldly proclaim that "[t]here
a number of cases closely resembling the Perovich case in
ch the trial court has dismissed an action, and those dismissals
e been uniformly upheld on appeal." [Appellee's Brief, page
.

An examination of the numerous cases cited by Appellee,
ever, reveals that neither individually nor collectively do they
r out this contention. What Appellee has done, apparently, is
fix upon certain superficial similarities between the cases which

cites and the instant case, while remaining myopic to fundamental tinctions.

Appellee characterizes Grunewald v. Missouri Pacific lroad Co., 331 F.2d 983 (8th Cir. 1964) -- one of the cases upon ch Appellee appears to rely most heavily -- as "[b]earing a iking resemblance" to the instant case, apparently because h involved successive continuances and substitutions of counsel. pellee's Brief, page 41]. What he ignores, however, is that Grunewald there was apparently a fifteen-month hiatus during ch, so far as appears from the opinion, nothing substantial done to advance the case to trial. In the instant case, of rse, Appellant was working constantly toward bringing the e to a final adjudication. More than that, Grunewald concerned a failure to file a trial brief on a given date, but a failure be prepared for a scheduled trial. The latter is obviously e disruptive to the administration of justice and prejudicial opposing counsel than the former.

In another case upon which Appellee relies heavily, ior v. Lansing Drop Forge Co., 124 F.2d 440 (6th Cir. 1942), missal was based on derelictions far more extreme than any which Perovich is guilty, and far greater prejudice to the endant than any which United suffered here. In Refior, trial actually begun ten months after the filing of the action approximately five years prior to the dismissal. Following commencement of the trial, there were long hiatuses -- in the regate a matter of years -- during which apparently nothing

ll was done to advance the case to final determination, despite fact that restraining orders were in effect which materially ired the ability of the defendant to conduct its business.

Two of the cases which Appellee cites, Hooper v. Chrysler, rs Corp., 325 F.2d 321 (5th Cir. 1963), cert.den., 377 U.S. 967, Blue Mountain Construction Co. v. Werner, 270 F.2d 305 (9th 1959), cert.den., 361 U.S. 931, involved situations in which e was a deliberate refusal by the plaintiff to proceed to l. A court is obviously justified in dismissing under those umstances, but that fact is irrelevant to the instant case e here, prior to the entry of that order of dismissal, Appellant red to proceed with the case if only he was given to a date oximately three weeks after the date upon which the dismissal r was ultimately entered in which to prepare his trial brief.

Appellee asserts that "[a]nother aggravating factor ifying dismissal of the Perovich case was that plaintiff's sal to pay sanctions and to proceed with the trial brief was deliberately," citing O'Brien v. Sinatra, 315 F.2d 637 (9th 1963). [Appellee's Brief, page 45].

Appellant agrees that the intent of the plaintiff is levant factor in determining whether dismissal is warranted. the interest of the Appellant was not to frustrate court rs but only to bring a case in which he had invested so much and money to a disposition based upon its merits, not upon inadequacy of its presentation.

Sandee Manufacturing Co. v. Rohm & Haas Co., 298 F.2d 41

h Cir. 1962) and Becker v. Safelite Glass Corp., 244 F.Supp. (D. Kansas 1965), are cited by Appellee to support its tention that "courts have shown no hesitation in dismissing il antitrust damage cases, and certainly have not treated itrust cases as something sepcial [sic],less susceptible to missal when a plaintiff fails to prosecute or defies court ers." [Appellee's Brief, page 46].

Appellant agrees that courts have dismissed anti-trust ions on these grounds and has never argued to the contrary. does believe, however, that the fact that antitrust cases ve an important public policy and that an antitrust plaintiff t bear a particularly onerous burden are among the many factors ch a court must take into account in determining whether or dismissal is the appropriate remedy. Neither Sandee nor ker indicate otherwise.

Appellee cites seven cases, Levine v. Colgate-Palmolive pany, 283 F.2d 532 (2nd Cir. 1960), cert.den., 365 U.S. 821; tz v. Hooper-Holmes Bureau Inc., 327 F.2d 939 (5th Cir. 1964); kage Machinery Company v. Hayssen Manufacturing Company, 266 d 56 (7th Cir. 1959); Sleck v. J. C. Penney Company, 26 F. . 209 (W. D. Pa. 1960); Fitzsimmons v. Gilpin, 368 F.2d 561 h Cir. 1966); Janousek v. Wells, 303 F.2d 118 (8th Cir. 1962); dom v. Texas Company, 27 F.Supp. 992 (N.D. Ala. 1939) from ch it generalizes that "failure to comply with a court order failure to perform a step necessary to the continuation of the e will furnish ample grounds to justify the trial court in

rcising its discretion to dismiss the action." [Appellee's
f, pages 46-47].

It is difficult to see how the cases, or indeed the
ralization drawn therefrom, contribute to the resolution of
instant case. Obviously there are many cases in which "failure
comply with a court order or failure to perform a step
ssary to the continuation of the case" has been held to justify
issal. Equally obviously, there are many cases in which these
ons have been held not to justify dismissal. Thus the issue is
whether Appellant failed to comply with a court order or perform
ep necessary to the continuation of the case but whether,
ite that fact, dismissal was appropriate. The cases cited
ppellee contribute little to the resolution of this question.

Levine v. Colgate-Palmolive Co., 283 F.2d 532 (2nd Cir.
), a one-paragraph opinion, was a case in which plaintiff
led to appear at trial and in which the facts disclosed at
re-trial conference indicated that he did not have a valid
im in any event.

Wirtz v. Hooper-Holmes Bureau, Inc.,327 F.2d 939 (5th
. 1964) was a case in which the Secretary of Labor definitely
irrevocably refused to comply with a court rule requiring
laintiff to provide the defendant with a list of the witnesses
planned to call. The situation was obviously far different
n that involved in the instant case.

Package Machinery Co. v. Hayssen Manufacturing Co.,
F.2d 56 (7th Cir. 1959), like Wirtz, involved an absolute

isal situation.

In Sleek v. J. C. Penney Company, 26 F.R.D. 209 (W.D. 1960), the plaintiff failed to file a pre-trial statement ite four notices from the court to do so.

Fitzsimmons v. Gilpin, 368 F.2d 561 (9th Cir. 1966) was se in which a fifteen-month hiatus took place during which e was, so far as appears from the record, nothing done to the case forward. When the court moved to dismiss the plaintiff d a statement in opposition which "made no showing of cause the action should not be dismissed" (368 F.2d 562).

In Janousek v. Wells, 303 F.2d 118 (8th Cir. 1962), the ntiffs, to quote the court, "impeded the progress of the gation by every obstacle and maneuver which their ingenuity d command" (303 F.2d 122) -- hardly the situation in the ant case.

Finally, the decision in Wisdom v. Texas Co., 27 F.Supp (N.D. Ala. 1939), is no more than an order of the District t dismissing the action for plaintiff's failure to appear a pre-trial conference. The action was not, so far as appears, the opinion, ever subject to review in an adversary proceeding ore the District Court or any other court.

Appellee's reliance upon Russell v. Cunningham, 233 F.2d (9th Cir. 1956) seems manifestly misplaced. By the very language the quotation from the case which Appellee sets forth [Appellee's ef, pages 47-48], the significant factor was that a very long iod had passed during which no progress toward advancing the

e to its ultimate disposition was made. In Perovich, on the
er hand, except insofar as he was prevented from doing so
a stay order, progress toward getting the case to trial was
ays being made.

Appellees state that "[c]ases in which abuse of discretion
dismissing has been found bear virtually no resemblance to the
ovich case" [Appellee's Brief, page 48]. In fact, reversal of an
er of dismissal may be warranted despite circumstances far
e extreme than any even suggested by the instant case.

In Glo Co. v. Murchison and Company, 397 F.2d 928 (3rd
. 1967), reargued 1968, cert.den., 89 S.Ct. 290 (1960), for
mple, the action had been pending for eleven years when it
dismissed. During a large portion of this time virtually
hing was done to move the case toward final resolution. Indeed,
er eleven years the plaintiff was still in the process of
paring interrogatories. The court warned the plaintiff's
nsel on numerous occasions that unless he proceeded with the
e it would be dismissed. The delay was severely prejudicial
defendants in that during the eleven years that the case was
ding two of the defendants' witnesses died, the last in the
r in which dismissal was ordered There was a court rule which
horized dismissal in cases in which no action was taken for
eriod of one year. Yet, notwithstanding all of the foregoing,
court of appeals, one judge dissenting, concluded "with the
atest reluctance that in view of the unusual nature of the
cumstances of this case the interest of justice will best

served by affording plaintiff an opportunity to prove its
e at trial." (397 F.2d 929)[3/]

Finally, Appellee argues that "Factors Urged by Plaintiff Mitigation of His Conduct Have Been Rejected in Other Cases" and ceeds to make such statements as "[a] new attorney is not en-led to enter the case with a clean slate," "[a] party who might e been prepared may not obtain a continuance merely because he not prepared," "[e]fforts to settle an action do not constitute pliance with court orders to prepare a brief," and "[d]elayed ers to obey court orders do not constitute compliance" [Appellee's ef, pages 50-55].

Appellant does not dispute these propositions as such has never argued otherwise. Appellant does believe, however, t the nature of the case, the reasons for the plaintiff's non-pliance with a court order, the efforts which the plaintiff made to advance the case to its ultimate resolution, and willingness to comply in the future are manifestly factors ch must be taken into account in determining whether or not

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The "unusual nature of the circumstances" of which the Court aks apparently refers primarily to the fact that "there appears be no dispute that an amount of money is owed to plaintiff er the contracts in suit." (397 F.2 929). In the instant case, re are also circumstances which militate against imposing the alty of dismissal -- the advanced state of the case and the e, money, and effort which have been invested in it.

h trial court abused its discretion in ordering dismissal.
ce of the cases cited by Appellee are to the contrary.

III

APPELLEE'S INSISTENCE THAT APPELLANT WAS FINANCIALLY ABLE TO PAY THE SANCTIONS ON THE APRIL 7 DUE DATE IS UNSUPPORTED BY ANYTHING EXCEPT CONJECTURE AND, PERHAPS, WISHFUL THINKING. IN ANY CASE THE POINT IS GIVEN GROSSLY EXAGGERATED IMPORTANCE BY APPELLEE SINCE THE FAILURE TO MAKE THE PAYMENT WAS PLAINLY NOT A GROUND FOR DISMISSAL UNDER THE CIRCUMSTANCES.

Appellee argues long and volubly, devoting nearly one
uarter of its brief to the proposition, that, Appellant had the
ney available to pay the sanctions on the due date of April
and voluntarily elected not to do so. [Appellee's Brief, pages
-38].

The references in Appellant's Opening Brief to Appellant's
hancial ability are based upon statements in the affidavits of
pellant Batris M. Perovich and W. Z. Jefferson Brown, Esq.
e affidavit of Perovich, dated March 16, 1967, stated in pertinent
rt:

"5. The only assets that I have of any substantial value which are not fully encumbered are my home and certain equipment which I formerly used in connection with the inplace lining and/or rehabilitation of concrete pipe. I presently have no cash on hand,

in any bank, or otherwise, except for the sums necessary to feed and clothe my family and pay my next mortgage payment. I have no present source of income although I do believe that I will be able to borrow between $5,000.00 and $10,000.00 in the next 60 to 90 days. Accordingly, it is my request and desire that any sanctions the Court might impose against me in connection with the above captioned cases, not be made payable prior to August 1, 1967.

"6. I have spent almost all of my time since January 19, 1967 to date:

(a) In an effort to raise money to pay costs and expenses in prosecuting Civil Case No. 63-278-MP and Civil Case No. 63-279-MP.

(b) In an effort to raise money to pay my attorneys' fees and other expenses that were previously incurred in connection with that litigation.

(c) In an effort to raise money to pay the sanctions of approximately $5,000.00, which I am informed by my attorneys will be levied by the Court against me and Inplace Linings, Inc.

(d) In consulting with my attorneys in connection with the above captioned cases."

[C.T. page 3714, line 32 to page 3715, line 25].

The affidavit of W. Z. Jefferson Brown, Esq., dated

ril 18, 1967, stated, in pertinent part:

"2. On or about April 4 and 5, 1967, I and Les J. Weinstein, as attorneys for the plaintiffs, communicated with Batris W. Perovich and Charles O. Davin, plaintiffs in the within action. They were asked whether they were financially able to pay the sanctions imposed by the Court in the amount of $656.15. They each responded that they were not financially able to do so and did not have the funds available to them to pay the sanctions." [C.T. page 3907 lines 12-18].

The information contained in these affidavits was lected in statements to the Court by Appellant's counsel [see, ., R.T. 4/6/67, afternoon, page 51, line 25 to page 52, line page 53, lines 3-5] and in a "Notice of Refusal to Pay Sanctions", ed May 11, 1967, which gave as one of the reasons for non- ment of the sanctions:

"The plaintiffs were financially unable to pay sanctions within the time ordered."

[C.T. page 3877, lines 3-4][4/]

In any event, Appellant does not regard the question his financial position on April 7 as of major importance in

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The foregoing does not, of course, necessarily mean that it ld have been impossible for Appellant to borrow the sum in stion from his counsel (assuming such was ethically permissible) otherwise, or even that Appellant's liquid assets were less than sum in question. But Appellant did not live in a financial uum in which the sanctions were his sole obligation, and obvious- his other obligations would have to be considered in determining financial ability to do anything.

e disposition of this appeal because the sanctions were improper-
assessed, and even assuming, arguendo, that they were properly
sessed, Appellant did in fact offer to pay them eighteen days
ter. Appellant submits that the effect of Appellee's treatment
the financial ability point is to divert the Court's attention
om facts which are far more significant to the disposition of
e instant appeal.[5/]

Be that as it may, however, Appellant will answer
pellee's arguments on the point. They are, Appellant submits,
nifestly inadequate.[6/]

First, Appellee attaches an affidavit to the Appellee's

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The fourteen pages which Appellee devotes to the point contrasts
arply to the few passing references to it in Appellant's Opening
ief.

One of these arguments is based upon a representation by Mr.
rovich in documents which are before this Court, but outside
e record on appeal, that the funds to pay sanctions were avail-
le on their due date and that he urged his counsel to make pay-
nt thereof; and upon a letter dated April 5, 1966 from Appellant's
unsel addressed to Charles Davin, the President of Inplace
nings, Inc. in Texas, transmitting a check in the sum of $10,000
yable to Inplace Linings, Inc., Batris W. Perovich and Northwest
pe Linings, Inc., a corporation, of which Perovich was President.

So far as the letter is concerned, the check obviously required
e signatures of all payees before it could be negotiated and
e proceeds thereof available for any purpose whatever. Even
suming, arguendo, that the proceeds of the check were not
nmitted to some other use, the letter in no ways shows that the
eck had been signed by all payees and honored by the drawee bank
that the proceeds were available to Appellant on April 7.

So far as Mr. Perovich's representation is concerned, Appellant
n only point out, as it did in Appellant's Opening Brief, (page
, footnote 17) that the representation is contrary to the
cord on which this case is being appealed.

ief which alleges that, in March of 1962, Appellant received 0,000.00 in settlement of a prior action against United and other fendants. Appellee's logic, apparently, runs something as follows: ince Mr. Perovich had $80,000.00 in March of 1962, it necessarily llows that he had the few hundred dollars required to pay sanctions United five years later, in April of 1967.

A litigant may not augment the record on appeal by bringing fore the appellate court facts which were clearly known to the itigant during proceedings in the court below. See Cockrell v. rrier, 375 F.2d 889, 891 (5th Cir. 1967); Cash v. Murphy, 339 F.2d 757, 3 (5th Cir. 1964). Hence, in view of the aversion to affidavits ch Appellee demonstrated throughout proceedings in the District rt, despite Appellant's vehement objections, Appellee's recourse an affidavit on appeal when its use is improper is ironical.

In any case, the absurdity of Appellee's logic is self-dent and requires no further comment.[7/]

Second, to establish "Mr. Perovich's history of making lse and incredible statements" [Appellee's Brief, p. 30], Appellee kes the Court through an awkward excursion on a totally

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In fact, the proposition is so palpably absurd that Appellant forced to suspect that Appellee's true purpose in attaching e affidavit is to prejudice the court against Appellant by plying that Appellant is a vexatious litigant who ought to have en satisfied with one recovery without attempting to obtain other. But this sort of contention cuts both ways. Appellant uld suggest that since the parties presumably do not pay $80,000 r nothing, and since the prior case involved, inter alia, a nspiracy to restrain trade, the fact of the prior settlement nds itself the inference that Appellant has a meritorious claim the instant case.

elated Ninth Circuit decision, Perovich v. Glen Falls Insurance pany, 401 F.2d 145 (9th Cir. 1968), in which this Court found t a jury verdict that Perovich misrepresented the value of stolen ds on an insurance claim was supported by the evidence, and n quotes as "[a]n example of an incredible piece of testimony Mr. Perovich" [Appellee's Brief, p. 31], three pages of Perovich's timony at deposition dealing with matters which have no direct ring whatever upon the questions which are presented by the tant appeal.

The question of the propriety of attacking credibility in appellate court aside, Appellee's insinuation that the testimony en by Mr. Perovich at his deposition is untrue appears to rest nothing more than speculation. So far as the Glen Falls opinion -- ch came down after the trial court entered its order of dismissal -- concerned, it is merely conjecture to say that because Perovich rvalued property for purposes of an insurance claim he misrepre-ted his financial situation to the District Court.[8/]

Thirdly, Appellee refers to statements by it in a trial rt memoranda that Charles Davin, the president of another intiff, a corporation against which the sanctions were assessed, ned and operated a two-engine airplane and lived on a tree-lined ate overlooking a lake";[9/] and that "Mr. Perovich received a stantial annual income from certain gravel pit operations and

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Moreover, what slight evidentiary value such a fact may have, is greatly outweighed by its inflammatory and prejudicial racter.

For a discussion of the propriety of imposing the sanctions inst this corporate plaintiff, see Appellant's Opening Brief, 58, footnote 40.

ed a substantial equity in a luxury home in San Marino, California." pellee's Brief, p. 30].

The irrelevancy of such facts, even if true, to establish Perovich or its corporate co-plaintiffs had any sum of money ilable for the purpose of paying sanctions to United and the er defendants on April 7, or any other given date, seems ious. Appellee's reliance upon evidence of this character is tually an admission of the weakness of its argument.

Finally, Appellee refers to certain statements and duct of Appellant's counsel, including the transmission of a check United's counsel drawn on the account of McKenna & Fitting in sum of the sanctions the day before the sanctions were due, and the District Court's approval of settlements with other defendants er which Perovich and the other plaintiffs were to receive tain sums of money [Appellee's Brief, pages 24-27].

However they may appear superficially, there is nothing these facts which refutes Appellant's contention that the essary funds were unavailable to it on the April 7 due date.

So far as the statements by Appellant's counsel, Mr. nstein, are concerned, they are in no way inconsistent with ellant's contention that they did not have the funds available pay the sanctions on the April 7 due date. It is true that indicated other reasons for not paying the sanctions as well. he always made it clear to the court that Appellant was in a ficult financial position and might fail to pay the sanctions that reason:

"My clients, as your honor knows from the affidavit, are practically destitute.[10/]

* * *

". . . it is not fair to make our clients take the food out of their children's mouths, which is exactly what they are doing [by paying the sanctions] in order to avoid a double barrel.

* * *

". . . Perovich, I don't want him to spend and incur obligations which frankly he does not have the wherewithal to pay. Mr. Perovich doesn't have the money. He is all tapped out, as he puts it. . ."

[R.T. 4/6/67, afternoon, page 51, line 25 to page 52, line 1; page 53, lines 3-5; page 53, line 25 to page 54, line 3].

So far as the check from Appellant's counsel is concerned, ellant explained in documents filed before the trial court:

"As the affidavit of W. Z. Jefferson Brown discloses, the transmittal of a check from plaintiffs' attorneys to defendant's attorneys on April 6, 1967 in the amount of $656.15 was a clerical inadvertence. Plaintiffs' attorneys had not received those funds from the plaintiffs and the check had been prepared

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The affidavit referred to is set forth in pertinent part page 18, supra.

on April 6, 1967 in the event that funds to pay the sanctions were received from the plaintiffs or any other unforeseen event thereafter occurring which would cause the sanctions to be paid by plaintiffs' attorneys." [C.T. 3905, lines 8-15].

affidavit referred to states:

"3. On April 6, 1967, at which time I was in attendance at the Court's hearing on the above-captioned case in San Francisco, I telephoned the offices of McKenna & Fitting and instructed the book-keeper to prepare a check in the amount of $656.15 payable to the law firm of Gibson, Dunn & Crutcher, which check was to be delivered only at my instruction. I did so in the anticipation that some event might occur on that date which, in our opinion, would justify our advancing the funds for them.

"4. I later learned that through a misunder-standing, the check was prepared and sent to Gibson Dunn & Crutcher almost immediately after my request that it be prepared. The check was transmitted through inadvertence since I did not instruct anyone to send the check to Gibson, Dunn & Crutcher.

"5. The aforementioned check was returned to McKenna & Fitting by Gibson, Dunn & Crutcher on April 7, 1967 at the request of McKenna & Fitting." [C.T. page 3907, lines 12 to p. 3908, line 2].

With respect to the settlement proceeds to which Appellee referred, Appellant explained:

> "Despite the protestations of the defendant United, the fact is clear that on April 7, 1967, the plaintiffs did not have funds available to pay the sanctions. On April 7, 1967, settlements were in mid-stream with respect to certain other defendants which settlements were thereafter to generate sufficient cash to pay the sanctions. This fact is an irrelevancy because the plaintiffs did not as of April 7 have $656.15 available for the payment of these sanctions. The sending of the check on April 6, 1967 by McKenna & Fitting to Gibson, Dunn & Crutcher was, as has been previously outlined, a clerical oversight which took place because plaintiffs' attorneys took precautions to prepare for the unforeseeable. The settlements by the plaintiffs with Centriline and American now having been accomplished, they have the funds to pay the sanctions if the Court and United, or the Court alone, will deem payment at the present time to be within a 'reasonable time' or nunc pro tunc compliance." [C.T. page 3934, lines 16-31].

Regardless of Appellant's financial situation, however, the fact remains that the sanctions were unlawful because of the means by which they were assessed [see Appellant's Opening Brief,

8]; and that, in any event, there was substantial compliance
t the order imposing sanctions.

Appellee dismissed Appellant's objection to the imposition
anctions by the District Court on the basis of unverified
ements from defendant's counsel with the bland statement that
e attorneys fees "are whatever the attorney reasonably charges
client (or as the case might be his opponent) the idea that
se charges are a matter of cold facts to be determined by
idavits for cross-examination makes little sense" [Appellee's
f, page 57].

Perhaps, as Appellee suggests, the court could have
ely set a "reasonable fee" and not taken any evidence at all,
ugh since the sanctions were designed to compensate defendants
the "time, trouble and effort" to which defendants had been put
the discharge of Perovich's attorney, knowledge of specifically
t that "time, trouble and effort" consisted of would appear to
essential [R.T. 1/17/67, page 174, lines 23-24]. But when
ourt does take evidence, and sets sanctions at an amount which
responds precisely with the amount claimed by the party so
t it is apparent that the court based its award on the evidence,
t evidence must be proper.

With respect to the matter of compliance, only eighteen
s after the due date Appellant did offer to pay the sanctions.
hing had happened during the interim between April 7 and April
to indicate that the sanctions would be less adequate compensa-
on to United for the "time, trouble and effort' caused by

ovich's discharge of his attorney, if paid on April 25 than paid on April 7.[11/]

It is true, as Appellee states, that the offer was conioned upon the granting of an additional extension of time in ch to file the trial brief. But that, Appellant submits, does nullify its effect. If this Court decides that the District rt acted properly in dismissing the action because of Appellant's lure to file a trial brief, the question of whether the nonment of sanctions justified dismissal is, of course, moot. if the court decides that dismissal for failure to file a al brief was an abuse of discretion, it would be sheer sophistry affirm the action of the District Court on the ground of nonment of sanctions because Appellant conditioned his offer of pliance upon being given an opportunity to continue to prosecute action.

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/ Appellee's statement that Appellant "seems to believe that it error to impose sanctions for an action that does not itself rrant dismissal" [Appellee's Brief, page 55] is incorrect. pellant recognizes that a court has the power to impose sanctions an alternative to the penalty of dismissal. It is simply that pellant does not believe that the imposition of any penalty was propriate under the circumstances.

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IV

APPELLEE MISCONCEIVES THE NATURE AND EFFECT OF APPELLANT'S MOTION TO AMEND THE COMPLAINT, MODIFY THE PROTECTIVE ORDER, AND OBTAIN MODIFICATION AND/OR CLARIFICATION OF CERTAIN DISCOVERY PROCEEDINGS.

Appellee argues that "[u]nless the plaintiff can show at the lower court abused its discretion in (1) ordering payment of sanctions and (2) failing to give more time in the pretrial [ic] brief,... there should be no reversal even if the trial court erred, as alleged, in ruling on any of the collateral motions" [Appellee's Brief, p. 58].12/

What Appellee fails to realize, however, is that this kind of an argument begs the question. The point to which Appellee is apparently oblivious is that whether or not the District Court did abuse its discretion cannot be determined without considering the effect of the motions.

If, as Appellant contends, the District Court erred in denying the motions -- motions which related directly to the preparation and content of the trial brief -- it is obvious that the District Court was required to give Appellant additional time to file the trial brief; the District Court itself admitted

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12/ With respect to sanctions, of course, "the ultimate issue is not whether the District Court abused its discretion in ordering payment of sanctions", as Appellee alleges, but in ordering the case dismissed for non-payment of sanctions. The distinction is an important one, since this Court could find that the sanctions were properly imposed but that nevertheless it was error for the District Court not to permit them to be paid eighteen days late.

much [See Appellant's Opening Brief, pages 29-30].

But even if the District Court did not err in denying e motions, the motions still would be relevant because the plaintiff's tent is always a crucial factor in determining whether dismissal appropriate. Appellant submits that its right to the relief ught was, at the least, arguable; that the motions were made not r the purpose of obstruction or delay but to advance the case; at if the motions were granted it would have required the granting an extension to file the trial brief; and that under the rcumstances it was an abuse of discretion for the District Court t to at least grant Appellant an extension equal to the time asonably required for the preparation of the motions.

## V

## CONCLUSION

Appellant Batris W. Perovich has traveled a long and fficult road in the course of prosecuting this litigation. His vestment in it -- in terms of time, money, and, perhaps most portant of all, emotional commitment -- is a large one.

It may well be that everything that he has done is tile -- that upon an ultimate adjudication he will be unable prove his case and that everything which he has invested will lost. Perovich knows of this risk and he accepts it.

It is a far different thing, however, to deprive him the opportunity to prove his case.

Every case which is dismissed with prejudice on a

ocedural ground represents, in some sense, a failure of the
dicial process. Sometimes it is unavoidable because the orderly
ministration of justice requires it. Usually, it is not.

Perovich should have his day in court.

Respectfully submitted,

MCKENNA & FITTING

LES J. WEINSTEIN
AARON M. PECK

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA )
) SS
COUNTY OF LOS ANGELES )

I, ANN M. GOODWINN, being first duly sworn, depose and say:

I am a citizen of the United States of America, and a resident of the county aforesaid; I am over the age of eighteen years, and not a party to the within-entitled action; my business address is 427 West Fifth Street, Los Angeles, California 90013.

On April 24, 1969, I served the within APPELLANT'S REPLY BRIEF on the Appellee herein by placing two true copies thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Gibson, Dunn & Crutcher
John J. Hanson, Esq.
Robert E. Cooper, Esq.
Douglas M. Hindley, Esq.
634 South Spring Street
Los Angeles, California 90014

Ann M. Goodwin

SUBSCRIBED AND SWORN to before me
this 24th day of April, 1969.

Notary Public in and for said County
and State